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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAN YUNUS, SR.,

Plaintiff,

v.

17 Civ. 5839 (AJN)

J. LEWIS-ROBINSON, *et al.*,

Oral Argument

Defendants.

New York, N.Y.
October 3, 2018
3:00 p.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

EMERY CELLI BRINCKERHOFF & ABADY, LLP

Attorneys for Plaintiff

BY: ANDREW G. CELLI

DAVID B. BERMAN

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BY: KACIE A. LALLY

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(Case called)

THE COURT: Good afternoon. Please be seated.

I'll take appearances from counsel, starting with counsel for plaintiff.

MR. CELLI: Good afternoon, your Honor. I'm Andrew Celli with the law firm of Emery Celli Brinckerhoff & Abady. I'm here today with my colleague David Berman and our client, Equan Yunus.

THE COURT: Good afternoon to the three of you.

I would ask counsel when you're speaking if you could pull up the microphone. The room is beautiful on the eye but not on the ear.

For the defendants.

MS. LALLY: Kacie Lally, from the Attorney General's office, for the state defendants. I'm here with my colleague Daniel Schulze.

THE COURT: Good afternoon to both of you.

We're here for oral argument. Based on the motion to dismiss and the motion for preliminary injunction, I did refer this to the magistrate judge for an R&R, and I have objections. I put out an order raising a supplemental issue with respect to preclusion that I was banging my head against as I was working my way through this.

There are obviously a lot of issues in the case. We don't have time for all of it, necessarily. I think what I'd

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1 like to do is give each side 30 minutes. I'll ask plaintiff's
2 counsel to go first, and you may reserve some time if you like
3 for rebuttal. I would ask that you begin with the preclusion
4 discussion. Then after that, I'll leave it to you to
5 prioritize on the substantive issues and objections. I'll have
6 questions as we go, but I am focused, at least in the
7 immediate, on the preclusion issues and will ask you to begin
8 there.

9 If I take you overtime with my questions, I'll make
10 sure that we even out the time at the end, if we go over the
11 time allotted. But I think if we start with a 30-minute goal,
12 we can be done by the time that I need to be done.

13 With that, Mr. Celli.

14 MR. CELLI: Yes. Mr. Berman will handle the
15 preclusion issues, your Honor.

16 THE COURT: OK. That's fine.

17 Mr. Berman.

18 MR. BERMAN: Thank you, your Honor.

19 THE COURT: It's probably easiest to hear you if
20 you're at the podium.

21 Thank you.

22 MR. BERMAN: Good afternoon, your Honor.

23 THE COURT: Good afternoon.

24 MR. BERMAN: As discussed, I will cover the preclusion
25 issues.

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1 THE COURT: Let me ask, do you want to reserve some
2 time for rebuttal?

3 MR. BERMAN: Yes, five minutes.

4 THE COURT: Five minutes, so you've got 25 minutes
5 now.

6 Thank you.

7 MR. BERMAN: And your Honor, if it's all right, in
8 those 25 minutes, I was going to cover this and Mr. Celli was
9 going to cover the merits of our substantive due process claim,
10 so at some point in those 25 minutes, we'll switch.

11 THE COURT: That's fine.

12 Thank you.

13 MR. BERMAN: Your Honor, with respect to the
14 preclusion, there are two elements in the collateral estoppel
15 here. The first is that the issue is not either actually or
16 necessarily decided in the alternative, and the second is that
17 the party the preclusion is being asserted against have a full
18 and fair opportunity to litigate.

19 The first part of that, the "actually" or "necessarily
20 decided," is not satisfied here, and the reason is, first, it
21 wasn't actually decided because while there was a lot of
22 discussion of the *Knox* case at Mr. Yunus's SORA hearing, the
23 discussion was all in the context of his risk-level
24 classification.

25 THE COURT: Is it fair to say, Mr. Berman, that the

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1 arguments you're making here with respect to the collateral
2 estoppel issue of preclusion track very much the arguments that
3 were raised and discussed and ruled on by Magistrate Judge
4 Jones in the *Rooker-Feldman* context?

5 There's a dispute. Was it really argued? Was it
6 really decided? It's essentially the same set of arguments for
7 collateral estoppel as it was for *Rooker-Feldman*.

8 MR. BERMAN: Yes, your Honor.

9 I would agree with that, that the issue as to whether
10 or not it was actually decided greatly overlaps with
11 *Rooker-Feldman*, and the "necessarily decided" aspect of it
12 largely overlaps with the inextricably intertwined argument
13 that the state made with respect to *Rooker-Feldman*.

14 THE COURT: OK. I have the substance of the arguments
15 there.

16 Let's turn, then, to claim preclusion, or *res*
17 *judicata*.

18 MR. BERMAN: Certainly, your Honor.

19 I think the issue of *res judicata* here is that he,
20 Mr. Yunus, at his SORA hearing never had any opportunity to
21 make any sort of affirmative claim. It's hard to imagine that
22 there could be a circumstance of claim preclusion in a hearing
23 that's really -- while the C.P.L.R. and things like that apply,
24 really, a quasi-criminal proceeding, where he's still in the
25 defense posture; he can't assert any claims.

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1 THE COURT: How is the posture that Mr. Yunus faced
2 different than the posture that the defendant in the *Knox* case
3 faced?

4 MR. BERMAN: What the defendant in the *Knox* case did,
5 the defendant in the *Knox* case asserted, Look, this whole
6 proceeding that I'm being subjected to is unconstitutional.
7 And while Mr. Yunus, I suppose, could theoretically have done
8 that, I don't think -- if the *Knox* plaintiff had done exactly
9 what Mr. Yunus did, I don't think he would be barred by *res*
10 *judicata* had he never raised those arguments.

11 Once he decided to, rather than protest the state
12 court hearing as a violation of his constitutional rights just
13 for forcing him to participate, once he decided, had he just
14 gone through the hearing, done the risk-level classification
15 and then gone to federal court, I think that would have been
16 fine.

17 That hearing does not delineate any opportunity to
18 challenge the risk-level designation. Yes, one could always
19 say --

20 THE COURT: Do you think the defendant in *Knox* could,
21 after losing there, squarely, come into federal court and seek
22 relitigation of those issues in a 1983 action?

23 MR. BERMAN: No, I don't, your Honor.

24 THE COURT: So that's collateral estoppel --

25 MR. BERMAN: Yes, exactly.

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1 THE COURT: -- with respect to the issues decided.
2 And it's claim preclusion, in part, except to the extent that
3 if the law is not only matters litigated but matters that could
4 have been litigated; it seems like you're talking your way out
5 of that.

6 Let me just start with some background principles.

7 I apply New York law of claim preclusion here,
8 correct?

9 MR. BERMAN: Yes, I agree with that.

10 THE COURT: And does New York law on claim preclusion,
11 and let's focus specifically on *res judicata*, require no
12 relitigation not only of claims that were litigated but that
13 could have or should have been raised in a prior proceeding?

14 MR. BERMAN: Just sort of in the abstract?

15 THE COURT: Does it matter? Just to make sure we
16 agree on claim preclusion.

17 MR. BERMAN: Yes. As a matter of doctrine, yes.

18 THE COURT: What aspects of that doctrine aren't here?

19 MR. BERMAN: Your Honor, I'd say there are two things.

20 I'd say, first, he did not -- *res judicata* is more of
21 a technical doctrine in that it's, Did you have the opportunity
22 to assert the claim that you're now asserting? And yes, he
23 could've made that defensive argument. He could make an
24 argument, "I shouldn't have to be part of the proceeding" as a
25 matter of a defense to his risk assessment hearing, but he

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1 couldn't assert any affirmative claims.

2 THE COURT: I do want to make sure I understand that
3 argument. You're saying there's something about an affirmative
4 claim; there is no procedural mechanism.

5 MR. BERMAN: Exactly. There was no procedural
6 mechanism for him to seek, for him to move for what he's moving
7 for now, a preliminary injunction under 1983. It doesn't have
8 to be identical, but he didn't have any opportunity to even
9 assert what would be the equivalent of an affirmative defense
10 in a civil case or a counterclaim.

11 All he could do was make arguments to try to fend off
12 the state's attack on him, so to speak. There was no
13 opportunity to assert any sort of affirmative claim that take
14 away his rights under civil law.

15 THE COURT: I hate to ask the same question, but I do
16 want to make sure I have your answer in mind. The distinction
17 between the posture here and the posture in *Knox* is what?

18 MR. BERMAN: I would say -- I wouldn't say there's any
19 distinction in the posture. I would just say that what the
20 *Knox* plaintiff chose to do wasn't really within the scope of
21 what that hearing is supposed to be. It's supposed to be a
22 very narrow, technical hearing that's about, What is your risk
23 assessment? Are you a sexual predator?

24 There were certain enhancements that aren't at issue
25 in this case they were supposed to be deciding there. It's not

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1 supposed to be, Are you appropriately designated as sex
2 offender?

3 The plaintiff in *Knox* just went outside the scope of
4 that and said, Well, I'm just challenging the constitutionality
5 of this whole proceeding, which I guess you can do in any court
6 proceeding, but the fact that our client chose not to do that I
7 don't think should be a basis for claim preclusion.

8 THE COURT: I guess maybe specifically after *Knox*; I
9 gather what you're saying is that the procedural pattern *Knox*
10 chose was not an obvious one.

11 MR. BERMAN: Correct.

12 THE COURT: Maybe you're even saying it was an
13 incorrect one.

14 MR. BERMAN: I would say it's not within the purpose
15 of this narrow statutorily defined proceeding. I don't think
16 the court was wrong.

17 THE COURT: But no chain in the *Knox* line, in New
18 York, either in the SORA hearing itself or on appeal, and tell
19 me if I'm wrong about this, ever questioned the purview of the
20 court to consider the constitutional challenge.

21 MR. BERMAN: No, they did not, and I'm not saying that
22 the court was necessarily wrong from a jurisdictional
23 perspective to entertain it as much as I'm saying that the
24 right to challenge or sort of force participation in a court,
25 in a statutorily defined proceeding as unconstitutional I don't

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1 think can have a *res judicata* effect on an affirmative civil
2 rights case.

3 THE COURT: Any authority for that?

4 MR. BERMAN: Your Honor, I'd say it's more implicit.
5 For example, if you look at the difference between a case like
6 *Allen v. McCurry*, in the Supreme Court, versus a case like
7 *Haring v. Prosise*, *Allen v. McCurry* was a case where someone
8 was convicted of some sort of drug offense -- I don't remember
9 what it was -- in state court. They made a motion to suppress.

10 THE COURT: That's the problem. *Haring* was about the
11 application of Virginia law of preclusion, which is why I just
12 want to make sure we're on the same page.

13 The question is what does New York preclusion law
14 require, and does it apply to me? And the answer to that,
15 we've agreed, was yes. I don't see how *Haring* helps the
16 argument you're making, because what the court said there was
17 that Virginia law wouldn't treat it as precluded, therefore
18 it's not precluded.

19 MR. BERMAN: Your Honor, I guess, then, I would just
20 say I have not -- I've certainly looked and did not locate a
21 New York case where someone was in that analogous posture, that
22 they were convicted of something in New York State court and
23 then brought a federal 1983. But from reading that, the *Haring*
24 case, I don't think there was any --

25 THE COURT: I mean, it's not a common thing, I think,

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1 is part of the problem, since the '80s. Right?

2 MR. BERMAN: I'm sorry.

3 THE COURT: Since *Allen*, since *Migra v. Warren*, we
4 just know it's the case that there are preclusive effects from
5 state court proceedings where constitutional claims could have
6 been litigated.

7 MR. BERMAN: I guess what I'd say in response about
8 the *Haring* case specifically is while I agree with you, I'm not
9 disputing your explanation of the court's holding as much as
10 I'm saying there was nothing about Virginia law, at least as
11 explained in that case. I can't say I know all the nooks and
12 crannies of Virginia law in the '80s, but at least as explained
13 in that case, it seemed particularly usual. It seemed like it
14 would be sort of general things, what New York law is now,
15 raised or could have been raised. There was no sort of oddity
16 of Virginia law that made that case different than sort of the
17 run-of-the-mill *res judicata* issue that you're saying largely
18 doesn't come up.

19 THE COURT: I think you may be wrong about *Haring*. I
20 don't understand or read it to stand for a carve-out from the
21 basic principle, established first in *Allen* with respect to
22 collateral estoppel and then in *Migra* with respect to *res*
23 *judicata*, that the state law of preclusion applies, and if that
24 would hold a claim or an issue precluded, so it is.

25 MR. BERMAN: I don't view it as creating -- I guess I

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1 just wouldn't read *Migra* to apply to a case like this, where
2 there wasn't -- I guess where the nub of the issue is, whether
3 or not this was really, is whether or not there's a difference
4 between a defensive argument that one could make in a criminal
5 proceeding, even a case like *Haring* or *Allen*, that's a motion
6 to suppress. There's still an opportunity to make your case
7 there.

8 This, there's no opportunity for any sort of
9 affirmative motion practice. Just argue a level 1, 2 or 3
10 offender, make your best argument you are, make your best
11 argument you're not, and ruling. There's no opportunity for
12 any sort of affirmative claim that should, I think, be able to
13 preclude his rights under 1983.

14 And also just as a more general point, after *Knox* --

15 THE COURT: I do want to make sure, when you say an
16 opportunity, that you be heard on that. I want to make sure I
17 understand.

18 Again, because it's after *Knox*, it's hard to say there
19 was no opportunity to do it. There was an existing precedent
20 in which the exact issue was raised in that context, so I
21 wonder if you're trying to refine what it means to say an
22 opportunity to raise it in some way.

23 MR. BERMAN: I think there's a difference between
24 being able to raise a defensive argument and being able to
25 raise an affirmative claim under 1983. The doctrine's called

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1 claim preclusion. I think that does have a literal meaning,
2 that it means that you assert it or had an opportunity to
3 assert the same claim, whether it be in an affirmative posture
4 or at the very least in a defensive posture, where you are able
5 to make some sort of affirmative case as opposed to a SORA
6 hearing where the state puts on an affirmative case, you defend
7 yourself, and that's that.

8 There's no opportunity for a defendant to make any
9 sort of affirmative motion, request, anything. In the *Knox*
10 case, they made an argument that then got appealed and went up.

11 THE COURT: Right, but it suggests some idea that the
12 courts in New York are sort of engaged in considering and
13 resolving issues that are not somehow properly before it.
14 Again, I think maybe you're suggesting that there has to be
15 some readily available procedural mechanism by which to bring
16 the particular challenge.

17 MR. BERMAN: Yes, I would argue that.

18 I think that *res judicata* is a much more technical
19 doctrine while collateral estoppel is a little bit more
20 substantive. This is about, Was the technical opportunity to
21 present the claim as a procedural matter there in some form?

22 Most of these cases are about, Oh, should they have
23 raised this as an affirmative defense; should they have raised
24 it as a counterclaim?

25 THE COURT: Most of which cases?

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1 MR. BERMAN: I'm saying most of sort of general New
2 York cases. In my read of them, most cases where *res judicata*
3 comes up are cases where the question is, What happened in
4 state court? Is there some other litigation they say, Should
5 we have asserted this as a counterclaim, or should this have
6 been a defense instead of an affirmative litigation, or a
7 counterclaim?

8 Those are still all procedural mechanisms to make the
9 same, to bring the same point forward, while this is not really
10 that.

11 THE COURT: Do you know, and maybe you don't, and
12 that's fine, but do you know, sort of aside from this context,
13 whether constitutional challenges of the kind that generally
14 are being made in SORA proceedings, when SORA was first passed,
15 were there constitutional challenges to it that matched that in
16 the SORA hearing itself?

17 MR. BERMAN: The big example, the only example I know
18 of is the *Doe v. Pataki* one, where they went through the SORA
19 hearings and then brought federal 1983 actions before Judge
20 Chin. And the only issue there was *Rooker-Feldman*, that was
21 raised was *Rooker-Feldman*, and Judge Chin essentially said:
22 Look, they went through those proceedings, but these cases
23 aren't barred because I'm not addressing what happened in those
24 proceedings; I'm just addressing the underlying process and
25 whether that was constitutional.

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1 THE COURT: I gather that, like the early posture
2 here, as far as you could tell, collateral estoppel and *res*
3 *judicata* weren't raised.

4 MR. BERMAN: I believe that is correct, your Honor.
5 Judge Chin made no mention of either preclusion doctrine, just
6 *Rooker-Feldman*.

7 And along those lines, can I transition to waiver?

8 THE COURT: You may.

9 MR. BERMAN: Your Honor, along those lines, I really
10 just don't think that this issue should be heard here.

11 This motion for preliminary injunction was referred
12 six months ago. The state submitted an opposition to the
13 preliminary injunction. They submitted, then, an affirmative
14 motion to dismiss, never raised this issue. And the majority
15 of circuits to reach that issue as to whether something was
16 referred and wasn't raised is waived to come out or has some
17 form of waiver. I don't mean "waived" in the technical sense.

18 THE COURT: Do you agree that if the motion to dismiss
19 is denied they can assert it as an affirmative defense in the
20 answer and it will be litigated down the road?

21 MR. BERMAN: Depending on how it's handled in this
22 proceeding, there may be law of the case, but as a Federal Rule
23 of Civil Procedure matter, yes. I would agree, your Honor.

24 THE COURT: But just to spin out what you're
25 suggesting, waiver in the sense of what's been briefed is what

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1 should be dealt with here up to this point, so if I conclude
2 that it's waived for purposes of the PI and the motion to
3 dismiss, they can assert it in the answer.

4 MR. BERMAN: Yes.

5 THE COURT: And we'll deal, down the road, with the
6 question of whether preclusion stops me from considering it.

7 MR. BERMAN: I think that's correct.

8 I mean, I think just as a technical sort of procedural
9 mechanism, that's true. But I still think the process works
10 the way it works for a reason. This case was referred, and
11 there's more than ample opportunity to brief it in front of the
12 magistrate, and the issue can be addressed down the road.

13 For it to come up for the first time at this posture
14 is not fair to my client. It defeats the whole purpose of the
15 Magistrates Act. And I'll add that these cases I'm talking
16 about that have reached that conclusion are all cases where the
17 party at least raised the issue in their objections.

18 Here, the state didn't even raise the issue in the
19 objections. They had a one-sentence throwaway: In the
20 alternative, it's barred by *res judicata*.

21 The law is clear on that. The standard of review is
22 clear error. I think, at most, the only question that should
23 be asked for purposes of these motions is whether or not Judge
24 Moses committed clear error for not dismissing the claim, for
25 not dismissing plaintiff's substantive due process claim on the

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1 basis of an unraised collateral estoppel or *res judicata*
2 defense. I think the answer to that is undoubtedly no.

3 THE COURT: OK.

4 MR. BERMAN: Unless you have further questions on
5 this --

6 THE COURT: Actually, why don't we do this. I'm going
7 to change course.

8 Let's get the state's argument on the preclusion
9 issues. I'll give the state equal time on that, and then I'll
10 let Mr. Celli come in and make the substantive arguments.

11 MS. LALLY: Would your Honor prefer me to start with
12 the issue of *res judicata* or start with *Rooker-Feldman*? Do you
13 have a preference?

14 THE COURT: I'd like to start with *res judicata*.

15 MS. LALLY: OK.

16 THE COURT: It's Ms. Lally, correct?

17 MS. LALLY: Yes.

18 THE COURT: Let me just get a time check. I want to
19 give you equal time.

20 It's been 20 minutes, so we'll give you 20 minutes and
21 then we'll turn to the other issues.

22 MS. LALLY: As your Honor's aware, *res judicata* gives
23 binding effect to a judgment in a court of competent
24 jurisdiction, prevents parties and their privities from
25 relitigating questions that were or should have been raised in

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1 a prior proceeding.

2 As your Honor alluded to, when determining the effect
3 of a state court judgment, federal courts apply the preclusion
4 law of the requisite state; here, that's New York. That is
5 important because, in New York, the transactional approach to
6 *res judicata* is applied, so once a claim is brought to a final
7 conclusion, all other claims arising out of the same
8 transaction or series of transactions are barred, even if based
9 upon different theories or seeking a different remedy. And I
10 pulled that language from the *Hevireaux* case, which was decided
11 by your Honor.

12 Now, plaintiff here admits that Mr. Yunus could have
13 raised these arguments before the state court.

14 THE COURT: Well, not really. I mean, he could have
15 in some broad, theoretical sense, because *Knox* did; I think
16 they have to admit the reality of that. But there is a version
17 of the argument or a view of the argument, which is that maybe
18 *Knox* was wrong. Maybe the SORA court in *Knox* was wrong to
19 consider it. There's no obvious procedural mechanism to bring,
20 they say, a challenge like this. Is there?

21 I mean, you're probably in a better position to
22 answer. Are sort of broad constitutional challenges to either
23 the sort of facial constitutional challenges or as-applied
24 constitutional challenges brought in SORA hearings?

25 MS. LALLY: Well, as your Honor alluded to, the fact

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1 remains that it did happen in *Knox*, so it can happen. And
2 respectfully, I would submit that any time someone is appearing
3 before the court and thinks the court is doing something
4 unconstitutional, they're able to say, and the plaintiff even
5 conceded you're able to say: "This is not constitutional as
6 applied to me; this should not happen."

7 Then the mechanism for raising that is to preserve
8 that issue for appeal. Even if, maybe, you don't necessarily
9 know if it is properly done in that proceeding, you have
10 preserved it for appeal and can take the next step. If you
11 don't preserve it for appeal, then when you show up at the
12 appellate court, they're going to say: "I'm sorry; we have
13 nothing to work with."

14 Here, the course that should properly have been taken
15 and was, in fact, taken by the plaintiff in *Knox* was to say, at
16 the SORA hearing, "Respectfully, we don't think that this
17 applies to us at all."

18 THE COURT: How did they do it in *Knox*? Was there a
19 motion of some kind brought?

20 MS. LALLY: Your Honor, I'm not sure about that.

21 Really, the language was just taken from the
22 underlying cases, which say that the plaintiffs objected to
23 their designation as sex offenders at the SORA hearing. I
24 don't have the transcript or anything that I can cite to
25 specifically.

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1 As I mentioned, plaintiff admits that Mr. Yunus could
2 have raised the arguments, and this, respectfully, should end
3 the inquiry. Even if the claims are based on different legal
4 theories and seeking different legal remedies, they're, in
5 fact, barred by New York's law of *res judicata*.

6 Your Honor pointed out that the *Haring* case that
7 plaintiff cites to is quite different because the Virginia law
8 of preclusion applies.

9 Now, in Virginia, *res judicata* says that *res judicata*
10 does not apply unless the issue was actually litigated and
11 determined. That is quite different than the New York
12 transactional approach, which says issues that were or should
13 have been based on the same transaction or series of
14 transactions.

15 Respectfully, we're saying here that plaintiff could
16 have challenged his sex offender designation, and he's not
17 entitled now to run to the state court and reframe his
18 arguments as some sort of federal 1983 claim.

19 THE COURT: Well, I mean, they're federal claims,
20 right? It's that the state court could have adjudicated the
21 federal claims.

22 MS. LALLY: Yes, that's correct. They are
23 constitutional claims that the state court could have
24 adjudicated.

25 THE COURT: And to be specific, and then we'll turn to

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1 waiver, is your argument that claim preclusion applies to
2 plaintiff's substantive due process claim?

3 MS. LALLY: That's correct.

4 THE COURT: What about the procedural due process
5 claim?

6 MS. LALLY: We would say that, yes, it applies to both
7 the substantive and procedural due process claims.

8 THE COURT: What about the other claims in this case?

9 MS. LALLY: No, your Honor. We're not saying it
10 applies to all of those.

11 THE COURT: That's reasonable.

12 Let's turn to waiver.

13 MS. LALLY: Sure.

14 THE COURT: Let's just start with making sure I've got
15 the background facts right.

16 You didn't raise either collateral estoppel or *res*
17 *judicata* as bases to either dismiss the due process claims or
18 oppose the preliminary injunction.

19 MS. LALLY: That is correct, your Honor.

20 THE COURT: And despite Judge Moses's footnoted
21 discussion about collateral estoppel, you didn't raise any --
22 and tell me if this is right -- objection to the failure to
23 consider or appropriately consider or get right collateral
24 estoppel or *res judicata*.

25 MS. LALLY: In the objections to the R&R, we did

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1 briefly address the fact that, in our view, the claims could be
2 barred by *res judicata* for many of the same reasons as
3 *Rooker-Feldman*.

4 THE COURT: I think that's what Mr. Berman referred to
5 as your throwaway line.

6 MS. LALLY: It was admittedly brief.

7 THE COURT: OK.

8 MS. LALLY: But it was an objection.

9 THE COURT: In that case, your objections to the
10 R&R -- do you happen to have a page cite for that?

11 MR. SCHULZE: I believe that I can get it for you.

12 THE COURT: Thank you.

13 MS. LALLY: We'll pull that for you.

14 THE COURT: Take waiver.

15 MS. LALLY: I would say that the key issue is that
16 considering matters of efficiency, it doesn't make sense to
17 consider this issue now. I don't think that there's any
18 dispute that the affirmative defenses of *res judicata* and
19 collateral estoppel haven't been waived for purposes of the
20 case. We still have the opportunity to include those in our
21 answer, so it really does not make sense to make a
22 determination now that would likely have to be revisited again
23 during the case in chief.

24 It's inefficient and clearly an inappropriate outcome.

25 THE COURT: What do you mean "inappropriate"? In

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1 other words, if I say for purposes of the PI and the motion to
2 dismiss, you've waived, I presume you would answer at that
3 point and you would include it. If I conclude waiver, I don't
4 decide at this point the outcome on preclusion grounds.

5 Inconsistent holding is possible, although with PIs, it's a
6 preliminary likelihood of success, etc., but I think if I were
7 to decide on waiver, then it would be put off to another day.

8 What's inappropriate about that?

9 MS. LALLY: I take your Honor's point.

10 There's always a possibility of some sort of
11 inconsistent judgment, but I will say that the main issue would
12 be efficiency and the fact that, frankly, your Honor, we now
13 have had the opportunity to brief the issue and to raise the
14 issue and litigate it fully before your Honor. It's not a
15 situation where it's now going to be a surprise to anyone that
16 this would be considered on the record. I would submit that
17 between the efficiencies of considering the case in chief and
18 the fact that here we are today discussing it, we've had an
19 opportunity to consider the issues and brief them before your
20 Honor, it does make sense to consider those issues now.

21 THE COURT: All right. Thank you.

22 MS. LALLY: Apologies, your Honor.

23 In defendants' objections to the R&R, the page that
24 refers to *res judicata* is page 9.

25 THE COURT: Thank you.

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Mr. Celli. Mr. Berman.

MR. BERMAN: Quick rebuttal.

THE COURT: Quickly. Go ahead.

MR. BERMAN: Very quickly.

First, with respect to waiver, like you said, if it's not in the R&R, there's no substance to it beyond *res judicata*, it should be applied in the alternative. That's not a specific objection, as courts have held is necessary to warrant *de novo* review.

With respect to *Haring*, I just want to say the Virginia courts that it actually had to be litigated in for collateral estoppel, in footnote 9 of *Haring* right now, with regard to *res judicata*, it says:

"Like the federal courts, the courts of Virginia apply different rules of preclusion to matters arising in a suit between the same parties and based upon the same causes of action as those involved in the previous proceeding."

THE COURT: You have to slow down.

MR. BERMAN: Sorry.

In footnote 9 of *Haring*, it says:

"Under the doctrine of *res judicata*, 'the judgment in the former action is conclusive of the latter, not only as to every question which was decided,' and the quote goes on, and then says, right after that, 'the doctrine does not apply, however, to a later action between different parties or a later

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1 action between the same parties with a different claim or
2 demand."

3 To me, that is clear that Virginia law has the same
4 could-have-litigated standard, and they just viewed the federal
5 civil rights claim as a, quote/unquote, different claim or
6 demand as the state criminal adjudication.

7 THE COURT: Thank you.

8 Mr. Celli.

9 MR. CELLI: Good afternoon, your Honor.

10 THE COURT: Good afternoon.

11 Why don't we plan here 20 a side.

12 Go ahead.

13 MR. CELLI: Thank you, Judge.

14 It's good that we've cleared out some of the
15 underbrush here, because where we really are in this case is an
16 application for a preliminary injunction on behalf of Equan
17 Yunus to lift the designation -- the stigmatizing
18 designation -- of him as a sex offender, because the
19 application of New York Corrections Law 168 is unconstitutional
20 in this case.

21 THE COURT: You're not making a facial challenge.

22 MR. CELLI: That's right.

23 What I would like to start with are the three, I
24 think, critical and undisputed facts in the case. Two of them
25 are real facts, and the third is a legal fact.

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1 The first is that Mr. Yunus's crime had nothing to do
2 with sex, nothing to do with sex.

3 THE COURT: No dispute.

4 MR. CELLI: No dispute, and there were no background
5 facts with respect to sex.

6 This was not a situation where Mr. Yunus kidnapped
7 somebody and they couldn't prove that there was a sexual
8 motive, but there was evidence of it. This was a kidnapping --
9 horrible, terrible crime, which he acknowledges -- about money.
10 It wasn't about sex. That's the first undisputed and very
11 important fact.

12 The second is that there's actually been a factual
13 finding by a state court judge, having heard from the
14 government and from Mr. Yunus's criminal defense lawyer, that
15 he is unlikely ever to commit a sexual offense of any kind.
16 And if it helps the Court to acknowledge, there was no sexual
17 misconduct by Mr. Yunus in the 15 years that he spent behind
18 bars, so sex is not really part of this case as to Mr. Yunus.

19 And then the third fact, which really is sort of a
20 legal fact, is that every court that has looked at the sex
21 offender designation rules -- every one of them -- has found it
22 to be constitutionally suspect, at the least, to mislabel
23 somebody, to say that somebody who has not committed a sexual
24 crime, who is not likely to commit a sexual crime is a sex
25 offender. That's a problem, and in fact, even the government,

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1 the state in this case, does not contest that there is a
2 constitutional liberty interest at stake under the due process
3 clause.

4 The only question here, for substantive due process,
5 the second cause of action, all comes down to one question,
6 which is whether it is rational, in light of the legislature's
7 stated goals for this statute, Section 168 of the Corrections
8 Law, to affix the label of sex offender to this person, this
9 specific person.

10 THE COURT: Can I also ask, as a preliminary fact, if
11 it's also uncontested that the New York State legislature, in
12 its wisdom, did apply the Sex Offender Registration Act to
13 someone in Mr. Yunus's set of circumstances?

14 MR. CELLI: It did.

15 I mean, it's interesting what's happening if you look
16 nationally at this issue. There was this thing called the
17 Jacob Wetterling Act, which essentially encouraged states from
18 the federal level to have registries of this sort, and a number
19 of states decided to have two kinds of registries, a sex
20 offender registry and a violent felons or sometimes a criminal
21 predators-type registry, a separate registry. And that, I
22 think, acknowledges that in some states, the legislatures
23 decided that the stigma of the sex offender label is so strong
24 that people who don't commit sex crimes shouldn't be listed as
25 that.

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1 New York didn't do that.

2 THE COURT: That policy argument did not prevail on
3 the New York legislative body.

4 MR. CELLI: Yes, exactly.

5 But if we're going to take the legislature seriously,
6 and I agree that we should, we should also take seriously what
7 they said they were trying to accomplish.

8 What they said was they wanted to protect the public
9 from sex offenders, people who commit sexual violence, because
10 the conduct is repetitive and compulsive and there's likely to
11 be recidivism of that particular kind of crime. This is not a
12 general registry for people who are really dangerous.

13 THE COURT: It's interesting. That form of argument
14 is typically made in a construction context, right? Construe
15 the statute the following way because this kind of person is
16 not at all what the legislature had in mind, but you just said
17 a moment ago the legislature, whether they had Mr. Yunus in
18 mind, I think you agree, captured him in the act.

19 MR. CELLI: Yes.

20 THE COURT: What do I do analytically with the
21 legislative-purpose argument that you're making?

22 MR. CELLI: Under the substantive due process law of
23 jurisprudence, it's pretty clear that it's appropriate to focus
24 on what the legislature says it intends to capture.

25 Now, it's true that there's intention there; that is

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1 to say, on the one hand, they say they're talking about sex and
2 people who are compulsive and engage in repetitive behavior,
3 that are likely to be recidivists because they commit sex
4 crimes. And on the other hand, they added a category of people
5 that don't have, potentially don't have any sexual element to
6 their crimes.

7 But here, since we have an as-applied application
8 before the Court, it's appropriate doctrinally to look at their
9 reasoning for passing the statute and then apply it to this
10 person very specifically, a person who never committed a sexual
11 crime, who's not likely to commit a sexual crime and, in fact,
12 for which there was not even a sexual element or motive in the
13 crime that he pled guilty to. There's a disconnect between
14 what the legislature said it was trying to accomplish and what
15 its purposes were -- that's the due process, one prong of due
16 process argument -- and the person to whom it's being applied
17 in this particular case.

18 In *Robinson*, which is the Florida Supreme Court case,
19 they had exactly this case in front of them. It's like the
20 other side of New York in *Knox* and *Robinson* in Florida. And
21 they said on an as-applied basis, we're going to look at the
22 purpose, apply it to the person, and we're also going to factor
23 in, very importantly, the impact that this mislabeling has on
24 this person.

25 It's the most extreme stigma that we have in our

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1 society, to call somebody a sex offender. It's worse -- I
2 think far worse, and the courts acknowledge this -- than even a
3 child predator. The registration and notification requirements
4 under Section 168 and the Executive Law are onerous. Mr. Yunus
5 is going to be subject to this label and need to register and
6 give photographs and have people notified of the status until
7 the year 2036. It's a very long time.

8 And of course, he will be restricted in his employment
9 in various ways and subject to more harsh penalties if he ever
10 were to get into trouble again, which I doubt, as a result of
11 being a sex offender in a context where there's no sex in the
12 case.

13 Put another way, there's a mismatch between the label
14 and the person, and many courts have held, several courts have
15 held that that's a violation of the due process clause. We
16 have Florida in *State v. Robinson*. We have New Mexico in 2006,
17 the *City of Albuquerque* case, and we have two intermediate
18 courts of appeal in Ohio, *State v. Reine* and *State v. Small*.

19 There's a discussion in *Robinson* that I think is worth
20 returning to just for a moment, which is where they talk about
21 sort of general factors that the legislature is allowed to and
22 could consider; for example, what *Knox* said about 46 percent of
23 kidnappings have a sexual element to them. *Knox*, basically,
24 says there can be a little bit of give in the joints when we're
25 looking at a statute facially.

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1 What *Robinson* says, very clearly, is you cannot do
2 that when you are applying this to a particular person
3 essentially where there's been a fact finding -- a fact
4 finding -- with respect to this person that he has no sexual
5 misconduct in his past and is unlikely to ever have in his
6 future.

7 That's beginning, middle and end of the case from our
8 point of view on substantive due process. We meet the test
9 with respect to an injunction. It's in the public interest to
10 enforce the Constitution. There's no issue about irreparable
11 harm. And we would ask that the Court adopt Magistrate Judge
12 Moses's findings with respect to the second cause of action and
13 issue the injunction that lifts this stigmatizing designation.

14 THE COURT: Thank you.

15 MR. CELLI: Thank you, your Honor.

16 THE COURT: Ms. Lally.

17 MS. LALLY: Your Honor, it's undisputed here that the
18 rational-basis test applies, so what we need to consider is
19 whether the statute is rationally related to a legitimate
20 government interest. Obviously, that is a highly deferential
21 standard, and here, it's more than met.

22 THE COURT: Mr. Celli laid out a set of undisputed
23 facts, including sort of litigation facts. Do you disagree
24 with any of those?

25 MS. LALLY: With respect to plaintiff's time in

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incarceration?

THE COURT: Yes.

Mr. Celli, could you just say them one at a time.

MR. CELLI: Sure.

THE COURT: Basically, no sex in this case.

MR. CELLI: No sex in this case, a factual finding.

THE COURT: Ms. Lally, do you agree?

MS. LALLY: For purposes of this motion, we will concede it, but there has been no discovery, so we're not necessarily able to say that there's been no sexual component to any of the crimes.

My understanding is, at least, not only did plaintiff plead guilty to abducting a 14-year-old at gunpoint, but there was also an additional victim that was abducted as well. I, again, to the best of my knowledge, for purposes of this motion, would say I agree, no sex. I don't know that I could say that for the full case.

THE COURT: And then there was a finding.

MR. CELLI: There's a finding of no likelihood of sexual misconduct in the future. Justice Obus found that in the SORA hearing.

MS. LALLY: Yes, that's correct, that with respect to the finding in the SORA hearing, the court did say no likelihood of sexual misconduct in the future.

THE COURT: To circle back, are you going to attempt

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1 to relitigate that here?

2 MS. LALLY: Your Honor, I'm not trying to obfuscate or
3 be obstructionist.

4 My only concern is we do not have the full evidence on
5 plaintiff's crimes of incarceration and other things that might
6 have gone into his criminal conduct. Right now, I take
7 plaintiff's counsel at his word when he says that during his
8 incarceration, there's been no accusation of sexual misconduct.
9 I don't independently know that to be true.

10 THE COURT: OK. That's to the first point.

11 On the second point.

12 MS. LALLY: Yes. Yes, I -- yes, your Honor.

13 THE COURT: You see the irony.

14 MS. LALLY: Your Honor, I do not at all dispute that
15 in the transcript before Judge Obus, the judge says what he
16 says. I do not dispute that.

17 THE COURT: All right. Go ahead. I didn't mean to
18 take you off track.

19 MS. LALLY: Plaintiffs talked a lot about the problems
20 with potentially having an individual register as a sex
21 offender.

22 The New York legislature considered that. They
23 specifically chose to include people who had kidnapped minors
24 that were not their relatives within the bounds of being a sex
25 offender. And the legislature could rationally have considered

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1 things such as studies showing the high correlation between
2 kidnapping of minors and sexual assaults. Just because
3 plaintiff disagrees with these studies does not mean that they
4 don't exist.

5 The legislature could have considered the potential
6 for the underreporting of sexual assault by those who kidnap
7 minors, because in some cases, the minors disappear or they are
8 killed or they can't or won't testify; the potential that the
9 offender intends sexual assault but is prevented by arrest or
10 escape; the interest in the fact that a child cut off from the
11 safety of his or her everyday surroundings is vulnerable to
12 sexual abuse. The legislature could have reasonably determined
13 that, Look, the concern with trying to parse out who would have
14 been a sex offender but for some thing happening that prevented
15 the actual sex abuse to occur justifies this concern that
16 dangerous sex offenders would, in fact, escape registration,
17 would escape informing the public as to what their crime of
18 incarceration was.

19 Plaintiff alluded, and the R&R does as well, to the
20 claim that being a sex offender is stigmatizing.

21 Respectfully, that's something that the *Knox* court
22 specifically considered. They held that the interest
23 defendants assert in not having their admittedly serious crimes
24 mischaracterized in a way that is arguably even more
25 stigmatizing than a correct designation would be, and concluded

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1 that that's not a fundamental right as the due process cases
2 use that term.

3 I note that plaintiff does not appear to contest, and
4 in fact, admits that he could potentially be termed a child
5 predator but argues that being called a child predator is
6 somehow less onerous or less scary to the public than sex
7 offender.

8 Respectfully, I think that that argument does not
9 carry a lot of water. And I would note that the R&R
10 specifically talks about the fact that the administrative
11 burden in itself of trying to parse out who is a sex offender
12 and who isn't doesn't justify subjecting someone like plaintiff
13 to these requirements. But respectfully, we submit that this
14 misses the mark. It's not simply an administrative burden, and
15 the *Knox* court did not characterize it as such either. It is
16 the risk that otherwise dangerous sex offenders would escape
17 registration.

18 Now, I know that plaintiff talked a lot about the
19 Florida and New Mexico courts.

20 I think it's worth noting that New York is joined by
21 other courts, such as those in Illinois and Wisconsin, in
22 determining that this scheme is constitutional, and indeed, I
23 believe that the R&R identified one federal case in the Western
24 District of Kentucky that also upheld the constitutional
25 scheme.

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1 We submit that plaintiff needs to demonstrate that
2 there's no rational connection between the challenged
3 legislation and its public policy purpose, and plaintiff here
4 just falls very short.

5 THE COURT: All right. Thank you.

6 Mr. Celli.

7 MR. CELLI: Very quickly, your Honor.

8 I appreciate the difficult position that my colleague,
9 the state, is in.

10 THE COURT: I thought you meant Mr. Berman there for a
11 second.

12 MR. CELLI: Him? No. He's in great shape.

13 Seriously, I'm a veteran of the attorney general's
14 office. I know that it can be difficult to be in that
15 position.

16 THE COURT: As am I.

17 MR. CELLI: I know, your Honor.

18 But to acknowledge, as they did, quite forthrightly,
19 that the facts are undisputed as we sit here today, I think, is
20 an extremely important acknowledgment. I don't want to call it
21 a concession, because this part is not about winning; it's just
22 about being straight with the Court. That's terribly
23 important, and I think that that should weigh heavily,
24 candidly, in the Court's thinking here.

25 Just a modest point, which is we are not here arguing

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1 that the studies that the legislature relied upon are wrong, or
2 that there's not some abstract and theoretical possibility in
3 some circumstances of underreporting or dead victims or
4 anything.

5 What we have here is a very tragic and horrible case
6 of two kidnappings. One was of a 14-year-old child. One was
7 of a 27-year-old man. Neither of them had any element of sex
8 to them, and so whatever the legislature may have considered,
9 in its wisdom, in passing this legislation in the way that it
10 did, the Court is still obliged on an as-applied basis to
11 determine whether the purposes of the statute are rationally
12 related to this person, and that's the beginning, the middle
13 and the end of it for us, your Honor.

14 Thank you.

15 THE COURT: Thank you.

16 My thanks to counsel for your briefing and arguments.
17 Very helpful. The matter is submitted. Recognizing that this
18 is in a preliminary injunction posture and that time has passed
19 in light of the referral, I will get resolution to you as
20 quickly as I possibly can.

21 Thank you.

22 We're adjourned.

23 MR. CELLI: Thank you, your Honor.

24 (Adjourned)
25